No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

PETITION OF APPELLANT UNION PACKING COMPANY FOR REHEARING.

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To the Presiding Justice and Associate Justices of the United States Court of Appeals for the Ninth Circuit:

Defendant and Appellant, Union Packing Company, respectfully petitions for a rehearing of the decision herein affirming judgment for Plaintiff. The opinion was filed September 24, 1951, and is limited to about twenty-five lines, omitting any consideration whatsoever of the points advanced by Appellant for reversal of the decision of the Trial Court.

That the cryptic opinion of the Court is wholly unresponsive to the issues raised by the appeal is so obvious that in asking for a rehearing Appellant is virtually asking this Court to give some measure of consideration to these issues before permitting the judgment to become final by a rubber stamp affirmance. Unless a rehearing

is granted, a decision thoroughly erroneous in fact and law will have received the stamp of finality from this Court.

It is obvious also that to permit the decision to remain in its present form will result in the utmost confusion in an important phase of commercial law, which in the interest of public welfare must remain free from doubt.

The Holding of This Court.

While the actual holding of this Court is disguised by the refusal to set forth the facts or the issues, the Court has stated that:

I. The Trial Court under competent evidence found a firm contract;

II. The Court had found Plaintiff had expended large sums of money in the course of executing the contract, thus depriving Appellant of the benefit of the California statute of frauds;

III. There is nothing in the decision contrary to this Court's decision in *Wood Lumber Co. v. Moore Mill and Lumber Co.*, 97 F. 2d 402;

IV. There are some inconsistencies in the Findings of Fact and Conclusions of Law, but they do not require reversal.

These are the only statements made in the decision of this Court. Each statement is obviously inadvertent and erroneous under the record in this case and could not have been made upon even the slightest consideration of the points advanced by Appellant.

We realize that this Court is under a heavy pressure of work, but this work will not be lessened by an opinion

at once erroneous and misleading, which refuses to state the facts of the case or the legal principles applicable thereto.

Without rearguing the issues of this case, we wish to point out one by one that the statements made in the opinion of this Court, as above set forth, are irresponsible and incorrect.

I.

The Opinion Herein Is Erroneous in Stating That the Court Found a Firm Contract for the Purchase of Livestock or That There Was Competent Evidence Thereof.

The Trial Court's Conclusion "I" [R. 19] is that Appellant on September 8, 1948, and again on September 10, 1948, did "orally offer to purchase" the cattle, and by Conclusion "II" [R. 20] "plaintiff accepted the said offer by shipping 248 head of cattle from British Columbia, Canada, on September 29, 1948, consigned to them at Los Angeles, California."

The Trial Court also stated [R. 102] and at the conclusion of the trial [R. 123] that the evidence showed a continuing offer and not a firm contract. The same contention was repeatedly made in Appellee's brief (pp. 4, 14, 19, 37):

> ". . . defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head" (p. 4.)
>
> "The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties." (p. 14.)

> "Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties." (p. 19; Rep. Br. p. 3.)

Therefore, for this Court to say that there was a finding that a firm contract was entered into prior to delivery of the cattle is not only totally erroneous but goes directly to the teeth of the findings of the Trial Court and Appellee's entire theory of the case as asserted in its brief.

We have shown that there was no evidence of a continuing offer as found by the Trial Court, much less any evidence of a contract (Op. Br. pp. 9-18; Rep. Br. pp. 3-10); but whatever the state of the evidence, one thing is certain and that is that the Trial Court did not find, nor did Appellee contend in its brief, that there was a contract between the parties prior to delivery of the cattle in Los Angeles.

The statement of this Court that a firm contract was entered into is entirely unwarranted. This statement being the basis of the Court's decision, it necessarily results that the decision is erroneous.

We are unable to understand how this Court can permit such a decision, so completely at variance with the actual facts, with the findings of the Trial Court and with Appellee's own contentions, to become final without further consideration. In fact, the situation presented by the record in this case is such as to demand the profoundest study of the facts and decision of the Trial Court by this Court to determine whether such decision is correct.

In the first place, the Trial Court himself stated in referring to his difficulty in evolving a contract of any sort whatsoever:

> "This is probably the *closest* case I have had to decide since I have been on the bench." [R. 123.]

Certainly such a contentious and indeterminate "contract" should not be enforced in disregard of the Statute of Frauds.

Again, the Trial Court recognized that the legal principles applicable were very difficult and that instead of making a further study, he would go ahead and rule and permit the matter to be determined by this Court on appeal, saying:

> "If I am wrong on the law, *you have your remedy of appeal.*" [R. 128.]

And the Trial Court himself invited review of his decision by stating with respect to the case of *Wood Lumber Co. v. Moore Mill and Lumber Co.*, decided by this Court, 97 F. 2d 920:

> "With all due respect to my superior, Judge Stephens, *I do not think that is the law. I think that goes too far.*" [R. 122.]

When this Court fully and unreservedly approves a decision of the Trial Court arrived at in this fashion, it has effectually precluded all possibility of Plaintiff obtaining a fair trial or of justice being done between the parties to this case.

II.

The Opinion Herein Is Erroneous in Stating That the Expenditure of Large Sums of Money in the Course of Executing the Contract Deprived Appellant of the Benefit of the Statute of Frauds.

This statement is not only erroneous but it is a complete *non sequitur*. The error of this statement merely accentuates the error of the opening statement of the opinion. (Point I, *supra*.)

The Trial Court found, and the Appellee contended throughout its brief, that there was a continuing offer which became a contract when the cattle was delivered to Appellant in Los Angeles. This means there was *no contract prior to that time*. Also, the expenditures referred to as having been incurred by Appellee were all incurred prior to delivery in Los Angeles and consisted of custom duties and freight charges. Custom duties were paid when the cattle were brought across the border from British Columbia to the United States. The freight charges were incurred in shipping the cattle from Canada to Los Angeles, according to the Trial Court. [R. 13.]

These freight charges and custom duties were necessary to be paid on any shipment to any American market. There is no finding whatsoever that Plaintiff was damaged by this amount or any other amount. Presumably, the sales value of the cattle was enhanced by these expenditures just as by expenditures for feeding.

These expenditures were *not* "in the course of executing the contract," as this Court holds; for the Trial Court has found, and Appellee contends, that the contract consisted of Appellant's continuing offer which was accepted by delivery to Defendant in Los Angeles. [R. 19; Rep. Br. p. 3; Point I, *supra.*]

It is untrue that the expenditures were incurred "in the course of executing the contract," as this Court states, for there was no contract until acceptance of the continuing offer by delivery in Los Angeles; but *the California courts have expressly held that such expenditures are not sufficient under the Statute of Frauds.*

This Court has, in effect, overruled the case of *Booth v. A. Levy & J. Zentner Co.,* 21 Cal. App. 427, 431, a case which has not been questioned in the California courts. That decision holds that payment of freight charges by seller is entirely insufficient as a matter of law to take an oral contract out of the statute, saying:

> *"It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute would be to practically abrogate the statute of frauds."* (P. 431; emphasis added.)

If the Court is going to overrule this decision or refuse to follow it, it is submitted it is the duty of this Court to say so; and if there is any differentiation between the freight charges in this case and the payment of freight

charges in that case, the Court should say so. Otherwise incalculable confusion is inevitable.

Appellant has contended that the rule in the *Booth case* requires reversal of the decision of the Trial Court. If the rule of that case is not to be followed, it becomes the duty of this Court to say in what respect the principle of that decision is to be departed from. This Court is just as much bound by the rule in the *Booth case* as it is by a decision of the United States Supreme Court unless the case can be differentiated in legal principle, which up to now this Court has not attempted to do.

But even aside from the *Booth case,* it is uniformly held, contrary to the statement of this Court in its decision herein, *that the mere incurring of expenditures is insufficient* to relieve from the Statute of Frauds.

Even in the case of *Seymour v. Oelrichs,* 156 Cal. 782, cited by the Court herein, the California court states that acts of performance of a contract are not sufficient to take the same out of the Statute of Frauds.

> "The claim of plaintiff is *not that mere part performance of a contract* for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. *Such a claim would, of course, find no support in the authorities* . . . It was the change of position caused by his resignation from the Police Department upon which his claim wholly rests, and this resignation was, of course, *no part of the performance of the contract* of service . . ." (Emphasis added; pp. 793-4; Rep. Br. p. 15.)

III.

The Opinion Herein Is Erroneous in Holding That There Is Nothing in the Decision Contrary to This Court's Decision in Wood Lumber Co. v. Moore Mill and Lumber Co., 97 F. 2d 402.

In making this statement the Court itself is inadvertently overruling its own prior decision. This Court said in the *Wood case:*

> "Appellant argues that appellee is estopped to assert that the agent had no written authority. We see no reason for applying a different rule in respect to this contention than that applicable where estoppel is claimed with respect to the statute of frauds proper. In the latter case *it is necessary to show* not only a change of position to the injury of the party asserting the estoppel, *but also that there has been conduct on the part of the opposite party amounting to a representation that he will not avail himself on the statute to escape his agreement.* In Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, the case most strongly relied upon by appellant, there was a definite promise to give a written contract, which promise was never performed. The court in holding that there was an estoppel to assert the statute quoted from 5 Brown on Statute of Frauds, §457a, as follows: 'A plaintiff . . . must be able to show clearly . . . not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to *a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance* . . .' (Page 795, 106 P. page 94.)" (P. 409; emphasis added; Op. Br. p. 21.)

This decision, therefore, holds that mere expenditures on the part of the party asserting the estoppel, assuming that they amount to injury, are *not sufficient* to take the case out of the statute, but there must be something in the nature of a representation by the opposite party that he will not avail himself of the statute. This is the same principle announced in the case of *Seymour v. Oelrichs, supra.* But that principle is entirely overlooked by the Court in this decision, as it was by the Trial Court when it assumed that the mere incurring of expenditures removed any question of the Statute of Frauds.

That is not the law and has never been announced as a principle of decision by any court prior to the decision of this Court in the present case.

The fact that this Court could now state such a confusing principle of law, first, that expenditures in the course of executing the contract removed the bar of the Statute of Frauds, and, second, that this rule is in accordance with this Court's decision in the *Wood Lumber Co. case,* demonstrates beyond question that this Court has not had the benefit of a study of the applicable decision, including its own decision in the *Wood Lumber Co. case.*

If that case is to be overruled, it is submitted it should be done expressly and not by indirection or inadvertence. If it is no longer true that sustaining of injury by the opposite party in itself is insufficient to remove the bar of the statute, then this Court should say so in unmis-

takable terms and should not leave this feature of commercial law in a state of utmost confusion.

To ignore the defense of the Statute of Frauds in this case, as the Trial Court has done and as this Court has condoned, is to render the Statute entirely nugatory. All that a seller has to do to void the Statute is to ship goods to a "purchaser" and then assert an oral contract, the very situation which the Act was intended to preclude.

This alarming feature of the present decision of this Court, fraught with the most far-reaching consequences to commercial life, must be considered in the light of the clear statement of the Trial Court himself, in rendering his decision herein, with respect to the *Wood Lumber Co. case* when he expressly refused to follow that decision, stating:

> "With all due respect to my superior, Judge Stephens. *I do not think that is the law. I think that goes too far.*" [R. 122.]

This statement of the Trial Court shows beyond controversy that his own decision in his own mind was irreconcilable with the rule of the *Wood Lumber Co. case.*

When this Court says that there is nothing in the Trial Court's decision contrary to the *Wood Lumber Co. case,* it is either making an incorrect statement or it is declaring that the Trial Court did not know what he was doing. There is no other alternative. In either case Appellant was deprived of a fair trial.

IV.

The Opinion Herein Is Erroneous in Holding That There Are Some Inconsistencies in the Findings of Fact and Conclusions of Law That They Do Not Require Reversal.

This Court states that detailed recitation of the facts would be of little or no assistance to anyone. This is not true as the decision is necessarily an important precedent and the decision is also subject to review by a higher court.

This Court states that there are some inconsistencies in the Findings of Fact and Conclusions of Law; but there is no mention of Appellant's contention that the Trial Court was required to make findings of fact on all material issues necessary to support the judgment [R. 52] and that the findings do not support the judgment. (Op. Br. pp. 31-34.)

There was no finding that there were any expenditures incurred "in the course of executing the contract," as this Court says. Rather the finding is that the expenditures anteceded the contract. (Point III, *supra.*)

There is no finding that Plaintiff suffered damage in the amount of his expenditures or any other amount, and the presumption is to the contrary as on any shipment to this country these charges would have had to be paid and they would have resulted in a more favorable market. The ultimate receipts presumably were increased in the amount of the expenditures in sending the cattle to a large market. The findings, therefore, contained no basis for the theory of promissory estoppel espoused by the Trial Court in defiance of the decisions of this Court.

It is fundamental that:

> "Findings based on the evidence must embrace the basic facts which are needed to sustain the order."
>
> *Morgan v. United States,* 298 U. S. 468, 480, 80 L. Ed. 1288, 1295.

There are no such findings. Nor does this Court even assume such findings in its decision which is simply a rubber stamp affirmance.

The result is that the actual holding of the Court herein cannot fail to give rise to the utmost confusion.

What becomes of the holding in the *Booth case*, 21 Cal. App. 427, that the seller's payment of freight charges cannot be regarded as sufficient to take an oral contract out of the Statute of Frauds and that such a holding would abrogate the statute itself?

What becomes of the holding of this Court in the *Wood case*, 97 F. 2d 920, that in addition to injury of the party asserting estoppel, the opposite party must have represented by words or conduct that he would not avail himself of the Statute? Especially in view of the Trial Court's statement that

> *"I do not think that is the law. I think that goes too far."*

The Trial Court realized full well that under the facts of this record to follow the decision of this Court in the *Wood case,* would require judgment for defendant. He deliberately refused to follow this Court's rule.

By its rubber stamp affirmance of such defiance, and its failure to face and directly pass upon the issues presented by this appeal, this Court has not only approved a

miscarriage of justice, but has denied Appellant the benefit of the review to which it is entitled by statute, and has created a quagmire of confusion in our commercial law.

It is respectfully submitted that for the reasons advanced herein and in the briefs already on file, the decision herein should be vacated and the judgment of the Trial Court reversed.

Respectfully submitted,

BENJAMIN W. SHIPMAN,
Attorney for Appellant Union Packing Company.

Certificate of Attorney.

I, Benjamin W. Shipman, attorney for Appellant herein, hereby certify that in my opinion the Petition for Rehearing is well founded and, further, that said Petition is not interposed for delay.

BENJAMIN W. SHIPMAN,
Attorney for Appellant Union Packing Company.